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1946. K **File No.** O. Elec. Supply (L.U.W.C.)/46

Legal **DEPARTMENT**

(A) **BRANCH**

Subject:—

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Opinions under the Bombay Electric Supply (licensed undertakings war costs) Order, 1944

File No. O. Elec. Supply (L.U.W.C.)/46

1. Sectt. Slip 24 B e.

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Legal Department file no. O. Elec. Supply

(L.D.W.C.) / 1946

S.NO.	Compilation No.	subjects
		Opinion under the Bombay Electric Supply (Licensee undertakings' War Cost Order 1944
1.	R. . No. 1120/26-2-46 O. No. 2030/16-4-46	Question whether (1) is the right of the Electric Supply co. at Ganeshkhind to levy charge on the basis of the minimum hours fixed in clause 2 (a) of the conditions of the agreement with the Municipality is in order (2) whether the right of the Co. to levy surcharge is in order & (3) the war costs surcharges can be levied on the energy charges for the street lighting
2	R.i.No. 3063/9-4-46 O. No. 3694/16-5-46.	Clause 5-2nd proviso Question whether Bhusawal Electricity Co. Ltd. is competent to levy surcharge on its charges for the supply of energy x to the municipality clause9
3	R. . No. 4024/8-5-46 O. No. 4055/28-6-46	Question whether Govt. can revise charges and conditions only irrespect of maintainanc of street lighting equipment and not from the supply of electric energy for street light ing

Submitted.

I, please see letter from the Electric Supply Co. at Manabennur and the correspondence that passed between the Company and the Manebennur Municipality (p.37-41 ante) and the P.W.D. note at pp. 43-45 ante. It appears that the right of the Company to recover charges on the basis of the minium hours as laid down in para 2(a) of the condit ons in agreement with the Municipality (pp.1-17 ante) has questioned by the Municipality and the Collector to whom the matter was referred asked the Company to prepare bills in accordance with orders contained in P.W.D. letter No. 6041/36-B1. dated 29-9-1943 and he brought into effect a provisional settlement without prejudice to their rights. As the legal Adviser to the Company pointed out that the orders contained in the above letter had no legal force, the Company began submitting bills on the basis of minimum hours clause in the agreement. The Company furtherholds the view that their contract (so far as clause (2) (a) is concerned) with the Municipality remains unaffected and that it is entitled to charge on that basis although the District Magistrate has restricted the hours of supply by his order No.POISR 143, dated the 8th September 1942. The following questions are raised by the Company and are ~~xxxxx~~ referred by the P.W.D. for the consideration of the R.L.A.

(1) whether the right of the Company to levy charges on the basis of the minimum hours fixed in ~~xxxxxx~~clause (2) (a) of the conditi ns of the agreement with the Municipality is in order;

(2) whether the right of the Company to levy surcharge at 33 % in accordance with the G.O.No. 6041/36, dated 11-3-1943 in the case of street lighting is in order;

(3) whether thecontention of the Municipality that the rates embodied in the agreement for street lighting can be revied by Govt. under clause 9 of the Bombay Electric Supply (License undertakings' War Costs) order,1944, and

(4) whether the war costs surchagge can be levied on the energy charges for the street lighting calculated on the basis the min

of the minimum number of hours.

3. uestion No.1. The Electric Supply Co. at Ranebennur it appears, prepared the bills on the basis of the minimum hours of supply viz. 1800 lighting hours per year privided as in claus (2) (a) of the conditions of agreement (pp.1-17 ante) between the Co Company and the Municipality. The Municipality contends that the bills should be prepared on the basis of the energy actrally consumed as the Municipality were unable to use the electricity for the minimum number of hours due to the restrictions on lighting hours imposed by the D.W. P.W.D. is of the view that the control on the supply of electricity was imposed under the Defence of India Rules in the interest of both the license as well as the consumer and in view of the underlying control the Company is perhaps justified in levying charges on the basis of the minimum hours fixed in clause (2) (a) of their agreement with the Municipality. The R. L. A. is requested to advise whether this view is correct.

By order No. POIS/143, dated 8th September 1942 issued under clause (a) of sub-rule (2) of rule 81 of the Defence of India Rules, the D. M. Dharwar has restricted the supply of electrical energy in the town of Ranebennur between the hours 1-30 A.M. to 7-30 P.M. As a result of this order it appears the total number of lighting hours in a year for street lighting in the Ranebennur municipality area were reduced below the minimum of 1800 hours fixed under cl. (2) (a) of the agreement The question therefore for consideration of the R.L.A. is whether the municipality would still be liable to pay on the basis of the minimum hours fixed under the agreement. The question whether a special contract as in the present case can be ~~affected~~ affected by an order under rule 81 (2, a) of the Defence of India Rules has not been finally settled. In his opinion No. 25 dated 28th December 1944, the Advocate General has expressed the view that a special contract between the Electric Supply Co. and the Municipality cannot be considered to be an "instrument having effect by virtue of any enactment. The order issued by the D.M. in the present case cannot overrride the minimum hours clause in the contract. How can the contract be said to be partially frustrated by the Order as

there can be no such thing as a partial

frustration. Either the substratum of the

> contract is gone or it rems n fully binding as it was at its inception. This is so also in the caexe ofthe contracts part. of the performance of which becomes illegal, for in such cases the remainder of the contract will remain valid and enforceable. hether or not this is so will depend on whether the illegality is of such a nature that the performance of the rest of the contract is substantially different from the performance ~~of~~ orginally contemplated. In other words, illegality may or may not amount to a frustration according to the extent of its effect upon the contract; but where the contract was illegal from the inception the whole will be tainted, as also where any part of the consideration was illegal."
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> In Leiston Gas Co. v. leiston-cum-sizewell la mp standard to the plaintiffs was held liable to maintain the payments although their use was prohibited by the military. The Gas company here had not only contracted to supply gas but also to erect and maintain the standards and la mps, so that it could not be said tha t the illegalityin performance was more than partia . In such circumstances, unless they could have shown that the main basis or foundation of the contract had been destroyed or that the obligation to pay was dependent on the obligation to provide gas. they must fail.
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> This case was followed in Wycombe Borough Electric Light and Power Co. v. Chipping Wycombe Corporation (d) where a stipulution that a reduction should be made if lamps were not lit "for any cause whatsoever" was held to be limited in application to causes over which the plainffs ha d control,"

(Of, Effects of War on contract by Rogers at pp.68-70 and please see also Webber's Effect of War on Contracts at p. 486). On the anology of these cases, it appears, that the Company wa justifies in levying charges on the basis of ~~xxxbxx~~ of the minimum hours fixed under clause 2x (2)(a) of the conditions of the agreement. The view taken by the P.W.D. af in parts 3 of its note is correct.

4 Question No. 2.- The second question is whether the right of the company to levy surcharge at 33 in accordance with G.O. No. 6041/36, dated 11-3-1943 in the case of street lighting is in order. All doubts raised as to the validity of the levy of the surcharge by reason inter alia of stipulations to the contrary in contracts or agreements previously made by such licensees and persons then subsisting have been set at rest and express legal

validity to the surcharge levied is given by the Bombay Electricity Surcharge (Validation) Act, 1945 the surcharge levied under Order No. 6331/36 and 9-8-1944 was withdrawn and was replaced by Order No. 6331/36 and 9-8-1944 issued under clause 4(1) of the Bombay Electric Supply (L.U.W. costs) Order, 1944, since the agreement for street lighting with the Municipality was entered into by the Co. on 29-1-1940 i.e. (L.U.W.C.) ~~under~~ order does not apply to ~~any~~ clause 5 of the Bombay E.S. (L.U.W.C.) Order does not apply ~~t~~ in this case. In the circumstances, the Co. is justified in levying a surcharge at the rate of 33 under the Order. (of R.L.A's opinion No. 432, dated 18-1-1946). The view taken by the P.W.D. in para.4 of its note is correct.

5. Question No. 3.- The third question is whether the contention of the Municipality that the rates embodied in the agreement for street lighting can be revised by Govt. under-cl.9 of the Bom. Electric Supply (L.U.W. Costs) Order revise charges and conditions in respect of maintanance of street lighting equipment under any contract. ~~Under~~ Under cl.7 of the agreement the maintanance of the electric work is a charge on the licensee es. under cl. 8 the Municipality has to pay to the licensee a rate of 0-4-6 perunit ~~for~~ used for the purpose of street lighting . There appears no separate clause in the agreement providing for maintances charges; the rate of of 0-4-6 per unit is therefore obviously inclusive of maintance charges and would not come within the purview of cl. 9 (1) unless the charges for the supply of energy and ~~of~~ those for the maintanance of street lighting equipment are split up with the mutual consent by the portion to the agreement. he view taken by the P.W.D. in para 5 the note is correct.

7. Question No. 4..- he last question raised is whether the war costs surcharge can be levied on the energy charges for the street lighting ~~is~~ calculated on the basis of the minimum number of hours. Under sub-cl.(2) of cl.3 of the Bombay Electric Supply (L.U.W.Costs) Order, every war costs surcharge has to be calculated on overall charges of the licensee or sanction holder concerned for the supply of erergy before deducting rebate for prompt payment and expressed as a percentage of such charges. As pointed out in para.3 above the Company can levy charges on the basis of minimum hours fixed in the agreement with the municipality in which case the war costs surcharge will be levied on

the energy charges for the street lighting calculated on this basis. he view taken by the P.W.D. in para 6 of the note is correct.

Submitted with referenceto P.W.D. x notes dated 5 and 7-4-1946 at pages 105-108 ante.

2 Under sub-clause (1) of clause 4 of the Bombay xxxxxxxx Electricity Supply (Licensed Undertakings War Costsx order, 1944, as further amended, the Government of Bombay enhenced under P.W.D. order No. 6331/36 (iv) dated the 15th August 1944 at P. 22 ante, the rate of War Costs surcharge in respect of, Inter alla, Messrs. the Bhusawal xxxxxxxxx Electricity Company Ltd. Licensee of the Bhusawal Electric License, from 10 n.m. to 15 p.c. thequestion for consideration whether in view of the second proviso to clause 5 of the Bombay Electricity Supply (licensed Undertakings, War Costs) order, 1944, the Bhusawal Electricity Compahy, Ltd. is competnet to levy surcharge on its charges for the supply of energy to the Bhusawal Borough Municipality as a new agreement dated 2-12-1943 (p.63 ante) was entered into between them after 1-5-1942. The Municipality contents p.81-83 ante) that the war costs surcharge order issued by Government does not apply to the said now contract which commenced from 1-5-1943 (vide clause _ at P. 65 ante). However the Company argues (pp. 35-36 ante) that though the contract has been exxxxxxx entered into after 1-5-1942, the terms of hte contract xxx so far as the charges are concerned, are not changed, in as much as the xxxxxxxxxxxxxx energy is to be supplied at the same rate as specified in the previous agreement dated 11-12-1936 at pp. 57-62 ante and hence the war costs surcharge order is applicable to the existing contract also.

3. The Second proviso to clause 5 of the R.t.S. (L.U,W.C.) order 1944 reads;

"No war costs surcharge shall be effective upon the charges f the supply of energy under any contract entered into after the 1st May 1942 unless such contract provides for the samexx charges for energy as have been contained in similar previous contracts for similar supply by the licensed or sanction holder concerned (as to which in the event of dispute, by any party interested, the decision of the Provincial Government shall be fin or unless and to such extent as such application may be xxpressly

ordered by the provincal Govertment". The P.W.D. office has cohsidered this case under the said second proviso to clause 5 of the Order ta and for the reason stated in paras. 6 to 8 of P.W.D. office note dated 5-4-1945 has decided that the Municipality should pay the surcharg to the company at the rate of 15 p.c. fixed under g.o. P.W.D. No. 6331/5 (Iv) dated 15-3-1944 at p. 22. In this connection the D.S. P.W.D. is inclined to hold that the licensee is entitled to levy the surcharge so a long as the rate of annas four per unit is operative. If the Railway increases their rate for bulb supply and in consequence the licensee raises his rate to more than 4 annas clause 5 will no longer be applicable and the licensee will not be entitled to any surcharge. The A.A.A. is requested to state whether the above interpretation is correct.

4. Para. 2 of the P.W.D. office note dated 5-4-1946 at pps. 105-106 ante ~~dated 5-4-1945~~ summarises the terms of the old and new agreement entered into between the Municipality and the Company (vide pages) 56-68 ante. The examiner C.A. in his note dated - 2-2-1946 has stated as follows, namely:-

It cannot be said that the revised contract provides for the same charges for energy as did the old one. Yet the rate of supply of energy by the Railway to the Company viz.2.5 annas per unit has not been increa increased

Office of the R. L.A.

According to the second proviso to clause 5 of the Bombay Electricity Supply (licensed Undertakings War Costs) , 1944, "no war costs surcharge shall be effective upon the charges for the supply of energy under any contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the licensee holder concerned or unless and to such extent as such may be extremely ordered by the Provincal Government".

Under the new agreement dated 2-12-1943 between the Bhusawal Electric Supply Co. Ltd. and the Bhusawal Municipality.the rate of supply of energy for street lighting shall be four annas per unit, provided the rate of supply of energy by the Railway to the Company is As. 2-6 per unit. According to the same agreement if the Railway rate increases or decreases. th. rate of supply of energy viz. As.4 shall increase or decrease proportinately. Under the old agreement too the rate for supply of energy was fixed at As. 4 per unit. But it was not stipulated in that agreement that this rate would increase or decrease proportionately with the increase or decrease of the rate of supply of energy by the Railway. It appears that under the new agreement the Company has so far been charging for the supply of energy at the rate of As. 4 per unit, presumably because the Railway has neither increased nor decreased its rate.

Although the new agreement dated 2-12-1943 contains certain new conditions as regards the supply to energy, the rate fixed for the supply of energy is practically the same as agreed upon between the paties under the old agreement viz. As.4 per unit. Such being the position, this case appears to fall under the exception specified in the second proviso to the Bombay Electricity Supply (Licensed Undertaking War Costs) Order 1944, referred to above. Consequently the Company would be entitled to charge the war cost surcharge at the rate rixed by the Government. The View taken by the Dy. Secy, P.W.D. is correct.

P.N.M.

Remembrancer of Legal Affairs

Submitted.

2. Please see office notes underlying R.L.A. opinion No. 2830, dated 15-4-1946. The P.W.D. states that the R.L.A. xxxxhas not offered any specific remarks or the points raised by the company and that therefore it is presumed t at the R.L.A. xxx agrees with the view expressed by the P.W.D. and concerred xx in by the Electrical Engineer to Govertment at pp.43-47 ante. The draft letter put out by the P.W.D. at pp. 56-57 ante is shown to the R.L.A. before issue.

3. Since the view expressed by the P.W.D. in the office note at pp.43-45 ante was agreed to by the R.L.A. no specific remarks on the points raised by the company were made in this office U.O.R. to S.W.D. No. 2830. dated 15-4-46. Questions (1), (2) and (4) in the next draft letter at pp.56-57 ante are answered in the affirmative and as regards the question namely, whether the contention of the municipality that the rates embodied in the agreement of street lighting can be recised by the Government under clause 9 of the Bombay Electricity Supply (L.U.W.C.) order, 1944, it is stated that Government can revise charges and conditions only in respect of maintanance of street lighting equipment and not for the supply of electric energy for street lighting. But revision of charges and conditions in respect of maintanance charges can be made provided such charges are split up from charges for the maintanance of street lighting equipment with the mutual content by the parties to the agreement. Para. 2 of the draft letter will have to be amended by the addition of "provided the charges for the maintanance of street lighting equipment are spl t up from the charges for the supply of x electrical energy for street lighting The rest of the draft of the letter is in order

Please see P.W.D. office note d. 7-5-46.

The view expressed in para3 of the P.W.D. office note d. 14-1-46 is correct. The draft letter at pp. 56-57 is in order.

E.P.B.
15/6/

A.A. L.R. I agree. Reply may be as proposed by P.A.

R.[illegible]

11

R.I.No.4024, dated 9-5-1946.

Submitted.

2. Please see office notes underlying R.L.A's opinion No.2830, dated 15-4-46. The P.W.D. states that the R.L.A. has not offered any specific remarks on the points raised by the company and that therefore it is presumed that the R.L.A. agrees with the views expressed by the P.W.D. and concurred in by the Electrical Engineer to Government at pp.43-47 ante. The draft letter put by the P.W.D. at pp.56-57 ante is shown to the R.L.A. before issue.

3. Since the view expressed by the P.W.D. in its office note at pp.43-45 ante was agreed to by the R.L.A. no specific remarks on the points raised by the company were made in this office U.O.R.to ....., No.2830, dated 15-4-46. Question (1),(2) and (4) in the draft letter at pp.56-57 ante are answered in the affirmative and as regards the third question, namely, whether the contention of the municipality that the rates embodied in the agreement of street lighting can be revised by Government under clause 9 of the Bombay Electricity Supply (L.U.W.C.) Order, 1944, it is stated that Government can revise charges and conditions only in respect of maintenance of street lighting equipment and not for the supply of electric energy for street lighting. But revision of charges and conditions in respect of maintenance charges can be made provided such charges are split up from charges for the maintenance of street lighting equipment with the mutual consent by the parties to the agreement. Para.2 of the draft letter will have to be amended by the addition of "provided the charges for the maintenance of street lighting equipment are split up from the charges for the supply of electrical energy for street lighting". The rest of the draft of the letter is in order.

P.S.Wadkarni
8/6

Please see P.W.D. office note d.7-5-46.

The view expressed in para 3 of the P.W.D. office note d.14-1-46 is correct. The draft letter at pp.56-57 is in order.

Id.B.P.B.
15/6.

A.A.L.R. I agree. Reply may be as proposed by P.A.
Id. R.T.K. 11/6

R.L.A. Id. P.H.M. --
26/6/46.

U.R.to P.W.D.,No.4655, dated 28-6-46.